INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	4
Statement	4
Reasons For Granting the Writ	8
Conclusion	19
Appendix A	1a
Appendix B	2a
Appendix C	3a

TABLE OF CASES

American Range Lines, Inc. v. Commissioner, 200 Fed. 2d 845, (C.A. 2, 1952) 19
Arrowsmith v. Commissioner, 344 U.S. 6 (1952) 13
Burnet v. Sanford & Brooks Co., 282 U.S. 359 .....9, 13
Cohan v. Commissioner, 39 Fed. 2d 540 (C.C.A. 2, 1930) 16, 17, 18, 19
Cohan v. C.I.R., 11 B.T.A. 743 (1928) 17
Commissioner v. Wilcox, 327 U.S. 404 12
Harris v. Commissioner, 174 Fed. 2d 70 (C.A. 4, 1949) 19
Helvering v. Taylor, 293 U.S. 507 19
Molnar v. Commissioner, 174 Fed. 2d 70 (C.A. 4, 1946) 16
North American Oil Consolidated v. Burnet, 286 U.S. 417 .....10, 13
Rutkin v. United States, 343 U.S. 130, rehear. den. 343 U.S. 952 12
United States v. Lewis, 340 U.S. 590 .....8, 11, 13

STATUTE

Emergency Price Control Act of 1942, as amended, 56 Stat. 23ff., 50 U.S.C. App. Secs. 901 *et seq.* 5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

JACK M. CHESBRO, CARL SILVERSTEIN, MORRIS SILVERSTEIN AND SMILING JACK CHESBRO, INC., *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Jack M. Chesbro, Carl Silverstein, Morris Silverstein and Smiling Jack Chesbro, Inc., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on August 9, 1955, with a petition for rehearing denied on September 7, 1955.

OPINIONS BELOW

The opinion of the Tax Court is reported at 21 T.C. 123, and is set forth with its accompanying orders in the Record hereof* at pages 145-161, 177-184.

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* The Record herein, printed under the caption of this case in the United States Court of Appeals for the Second Circuit, bears the title "Appendix to Appellants' Brief on Appeal from the Tax Court of the United States," and has been filed with the present Petition.

The opinion of the United States Court of Appeals for the Second Circuit is reported at 225 Fed. 2d 674 (1955), and is set forth as Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on August 9, 1955 (App. A, p. 1a). Rehearing was denied on September 7, 1955 (App. B, p. 2a). Justice Reed extended the time within which to file Petition for Writ of Certiorari to and including January 6, 1956 (App. C, p. 3a), and then to and including February 4, 1956 (App. C, p. 4a). The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

Petitioners were engaged in the business of buying and selling used cars during the years 1946 and 1947. During those years they felt themselves at times compelled, because of existing market conditions, to pay to those from whom they purchased cars, and to exact from those to whom they sold cars, cash beyond the ceiling prices established by the United States Office of Price Administration for such purchases and sales. This practice was common during that period among used car dealers in their vicinity. Petitioners presented evidence of specific transactions in which this took place. Evidence was also submitted by them, and they proffered additional evidence which was refused by the Tax Court, to show that their business during this period was characterized by a pattern, in which the total amount by which their records understated the money received by them for cars they sold was substantially equal to the total amount by which their

records understated the money they spent for cars they bought.

The corporate petitioner maintained a "revolving fund," which began with cash contributed in equal amounts by each of the three individual petitioners. This fund was used by them to pay cash required on their purchases of cars, and was replenished with cash received on their sales. Cash received into or expended from the fund by any one of the three individual petitioners was noted individually by him, and all three would meet every few days and adjust their accounts. No permanent records of these transactions were maintained.

During the course of the fiscal year commencing July 1, 1946, according to the finding of the Tax Court (R. 156), the three individual petitioners received from the corporate petitioner certain moneys, some during calendar year 1946 and some during calendar year 1947. The Tax Court held that all these moneys (a) were taxable as constructive dividends to the respective individual petitioners (b) for the calendar year 1947 (R., 156, 160).

1. Could the Tax Court properly require the inclusion, in the individual petitioners' respective taxable incomes for the calendar year 1947, income which was received by them during calendar year 1946?

2. a. Should the Tax Court have allowed petitioners credit, for cash expenditures made by them in the purchase of cars, beyond cash expenditures in specific cases that were individually identified by witnesses?

b. Should the Tax Court have made a determination, or required the Commissioner of Internal Reve-

nue to make a determination, of the amount of such a credit?

STATUTES INVOLVED

The relevant statutes provide in pertinent part as follows: Internal Revenue Code of 1939, Sec. 41 (26 U.S.C. Sec. 41)*

Sec. 41. *General Rule*

> The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) . . .

Internal Revenue Code of 1939, Sec. 42 (26 U.S.C. Sec. 42)†

Sec. 42. *Period In Which Items of Gross Income Included.*

> (a) *General Rule*—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer . . .

STATEMENT

This case involves the challenge by petitioners of the correctness of findings by the Commissioner of Internal Revenue, as approved by the Tax Court and affirmed by the United States Court of Appeals for the Second Circuit, with respect to deficiencies in the income reported by them, and consequently in the taxes paid on their respective incomes, for the cal-

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* A comparable provision appears in the Internal Revenue Code of 1954 as section 441(a)-(c) (26 U.S.C. Sec. 441(a)-(c)).

† A comparable provision appears in the Internal Revenue Code of 1954 as section 451 (a) (26 U.S.C. Sec. 451(a)).

endar year 1947 in the case of the three individual petitioners, and for the fiscal year beginning July 1, 1946 in the case of the corporate petitioner.

The three individual petitioners were each owners of one-third the stock of the corporate petitioner, which was in the business of buying and selling used cars in Buffalo, New York. The operations of the corporation at the time of the events here involved were carried on by the three individuals as officers, and by employees of the corporation.

For several years ending June 30, 1946, and again from August 1 through November 19, 1946, the business of buying and selling used cars was subject to restrictions imposed by and under the Emergency Price Control Act of 1942 (56 Stat. 23 ff., 50 U.S.C. App., Secs. 901 *et seq.*), as amended, which limited the prices that could be paid or charged by dealers in their purchases or sales of used cars. During and after this period of regulation, however, petitioners found that they were unable to purchase cars at or below the maximum purchase prices established under the Act.* They also discovered that this condition was epidemic throughout the whole area in which they operated.* Faced with the grim choice between losing their livelihood by atrophy and buying the necessary supply of cars at prices over those established under the Act, petitioners were driven by stark necessity to pay more for cars they bought than was allowed under the Act.* So general was this practice at the time that, even by so doing, petitioners were hard put to maintain their stock of cars at the levels necessary to remain actively in business, and had constantly to

* See references to the Record, cited on pages 18-19, *infra.*

improvise ingenious means under great pressure to secure the necessary supplies.*

The state of the market at that time as to retail sales of used cars was in a similar situation. Dealers who paid more than ceiling, for the cars they bought to sell, would obviously not enjoy the margin contemplated under the schedules promulgated under the Emergency Price Control Act if they sold those cars at prices within the ceiling established under the correlative retail sales schedules; in any case, retail purchasers themselves were able and anxious to pay over-ceiling prices to secure used cars, and it was general practice throughout the area for them to do so.* Petitioners joined in the market practices prevalent in the time and place where they were doing business, and accepted prices above those allowed under the Act for cars they sold.*

Under the circumstances, petitioners found it expedient to distinguish the up-to-ceiling from the over-ceiling portions of their transactions. They followed the practice of having their books of account reflect only the up-to-ceiling portion of the purchase prices they paid and the sales prices they charged. As to this portion of their business, petitioners paid for purchases by check, and received money for sales either by check or in cash. With respect to those portions of their purchase or sales prices that exceeding the ceiling, however, petitioners dealt only in cash, and kept no permanent written records. Through their revolving fund they kept cash on hand to cover the over-ceiling portion of their payments for cars, and they accepted cash to cover the over-ceiling portion of

* See references to the Record, cited on page 18, *infra*.

their receipts. It was their experience that, over the months in which they followed this practice, their over-ceiling income and their over-ceiling expenditure maintained an approximate balance.*

Even during the month of July 1946 and after November 19 of that year, when the used car business was not under Government regulation—and, in fact, through the year 1947—petitioners found that the mores developed during the years of regulation had persisted; they had to continue to pay part of their purchase prices in cash additional to a check, and to receive part at least of their sales prices in cash. During this period, accordingly, they continued to operate as they had before, and through this period also they found that their over-ceiling income and their over-ceiling expenditure remained in approximate balance.*

During the course of the trial, the Tax Court declined to hear witnesses offered by the petitioners to show what were the general conditions prevailing in the Buffalo area in the used car business. R. 37-38, 41-42, 72-78. Testimony was given not only as to specific instances of purchase prices paid by petitioners and understated in their records, but also showing that a pattern did exist in petitioners' business practice of paying over-ceiling prices in purchasing cars for their business.* The Tax Court in its opinion, however, used such testimony as evidence only with respect to transactions that were specifically identified and corroborated by petitioners' books, and refused to consider any evidence of petitioners' general business practice.

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* See references to the Record, cited on page 18, *infra*.

The Tax Court found that during the fiscal year beginning July 1, 1946, the corporate petitioner had received from sales more money than was shown on its books, and determined further that the whole amount of this difference was distributed, in equal portions, as constructive dividends to the three individual petitioners. The Tax Court fixed the tax, on the *whole* of each petitioner's share so computed, as part of his income for the calendar year 1947, although the Court itself found that "some part" of this money had been received by the respective petitioners during the calendar year 1946. (R., 160).

REASONS FOR GRANTING THE WRIT

I

This case presents an issue of basic and general importance in cases involving the Federal income tax. That is the issue whether or not, in the words of this Court

> "Income taxes must be paid on income received . . . during an annual accounting period. Cf. I.R.C. Secs. 41, 42; and see *Burnet* v. *Sanford & Brooks Co.*, 282 U.S. 369, 363." [*United States* v. *Lewis*, 340 U.S. 590, 592 (1951)].

In the present case, the Tax Court accepted the Commissioner's determinations that the three individual petitioners herein "had received amounts from the corporation during its taxable year which were taxable to them as dividends." R., 156. And the Tax Court expressly stated that "some part" of these dividends "was received in [1946]." (R., 160). This was understating the case indeed, for the whole point of the Government's proof, and of the Court's opinion itself,

was the proposition that the money taken by petitioners from the corporation's revolving fund over the whole course of the corporation's fiscal year was as a practice retained, and was always intended by the three men to be retained, by them personally.*

This decision flies in the face of probably the most fundamental and basic principle of American income taxation. In *Burnet* v. *Sanford & Brooks Co.*, 282 U.S. 359, 363, 364-365 (1931), this Court declared:

> "All the revenue acts which have been enacted since the adoption of the Sixteenth Amendment have uniformly assessed the tax on the basis of annual returns showing the net result of all the taxpayer's transactions *during a fixed accounting period,* either the calendar year, or, at the option of the taxpayer, the particular fiscal year which he may adopt . . . The amount of all [items of income] is required to be included in the gross income *for the taxable year in which received by the taxpayer* . . . See *United States* v. *Anderson,* 269 U.S. 422; *Aluminum Casting Co.* v. *Routzahn,* [282 U.S.] 92." (Emphasis supplied.)
>
> * * * * *
>
> ". . . [The taxpayer's] net income for the period covered by the return . . . is what the statute taxes . . .
>
> * * * * *
>
> ". . . The net result of the two years, if combined in a single taxable period, might still be a loss; but it has never been supposed that that fact would relieve him from a tax on the first, or that it affords any reason for postponing the assessment of the tax until the end of a lifetime, or for some other indefinite period, to ascertain more

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* See references to the Record, cited and quoted on pages 13-15, *infra.*

precisely whether the final outcome of the period, or of a given transaction, will be a gain or a loss.

"The Sixteenth Amendment was adopted to enable the government to raise revenue by taxation. It is the essence of any system of taxation that it should produce revenue ascertainable, and payable to the government, at regular intervals. Only by such a system is it practicable to produce a regular flow of income and apply methods of accounting, assessment, and collection capable of practical operation. It is not suggested that there has ever been any general scheme for taxing income on any other basis. The computation of income annually *as the net result of all transactions within the year* was a familiar practice, and taxes upon income so arrived at were not unknown, before the Sixteenth Amendment. See *Bowers* v. *Kerbaugh-Empire Co.*, [271 U.S. 170,] 174; *Pacific Insurance Co.* v. *Soule*, 7 Wall. 433; *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601, 630. It is not to be supposed that the amendment did not contemplate that Congress might make income so ascertained the basis of a scheme of taxation such as had been in actual operation within the United States before its adoption. While, conceivably, a different system might be devised by which the tax could be assessed, wholly or in part, on the basis of the finally ascertained results of particular transactions, Congress is not required by the amendment to adopt such a system in preference to the more familiar method, even if it were practicable . . . " (Emphasis supplied).

In *North American Oil Consolidated* v. *Burnet*, 286 U.S. 417 (1932), North American had received income, paid to it in 1917 after dismissal by the District Court of a bill brought by the Government attacking the company's right to the money. The dismissal was appealed from to the Circuit Court of Appeals, and

a subsequent appeal taken to this Court was dismissed by stipulation in 1922. In deciding the question in what year the money involved should be considered as income, the Court pointed out that

> ". . . The net profits earned by the property in 1916 were not income of the year 1922—the year in which the litigation with the Government was finally terminated. They became income of the company in 1917, when it first became entitled to them and when it actually received them. If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent . . . If in 1922 the Government had prevailed, and the company had been obliged to refund the profits received in 1917, it would have been entitled to a deduction from the profits of 1922, not from those of any earlier year . . ." [286 U.S. at p. 424]

In *United States* v. *Lewis*, 340 U.S. 590 (1951), the taxpayer had reported as income for 1944 $22,000 received during that year as an employee's bonus, which he regarded as his own and used unconditionally for his own purposes. In subsequent litigation, however, it was decided that the bonus had been improperly computed and, under the compulsion of a judgment, the taxpayer returned $11,000 to his employer in 1946. The Court of Claims held that the income received "under a mistake of fact" in 1944 was not income during that year. Reversing, this Court said:

> "In the *North American Oil* case we said: 'If a taxpayer receives earnings under a claim of right

and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.' 286 U.S. at 424. Nothing in this language permits an exception merely because a taxpayer is 'mistaken' as to the validity of his claim. Nor has the 'claim of right' doctrine been impaired, as the Court of Claims stated, by *Freuler* v. *Helvering,* 291 U.S. 35, or *Commissioner* v. *Wilcox,* 327 U.S. 404. The *Freuler* case involved an entirely different section of the Internal Revenue Code, and its holding is inapplicable here. 291 U.S. at 43. And in *Commissioner* v. *Wilcox, supra,* we held that receipts from embezzlement did not constitute income, distinguishing *North American Oil* on the ground that an embezzler asserts no 'bona fide legal or equitable claim.' 327 U.S. at 408.

"Income taxes must be paid on income received . . . during an annual accounting period . . ." [340 U.S. at pp. 591-592]

Even in the *Wilcox* case, this Court, referring with approval to the criteria enunciated in *North American Oil,* pointed out that

"For present purposes, however, it is enough to note that a taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain." [327 U.S. 404, 408 (1946)]*

* The actual holding in *Wilcox,* that the receipts of embezzlement were not income obtained with a claim of right, was expressly limited to its facts in the contrary holding of this Court later with respect to the receipts of extortion through demands and threats, in *Rutkin* v. *United States,* 343 U.S. 130, 138 (1952), rehear. den. 343 U.S. 952 (1952).

". . . The 'claim of right' interpretation of the tax laws has long been used to give finality to that [annual accounting] period, and is now deeply rooted in the federal tax system . . . We see no reason why the Court should depart from this well-settled interpretation merely because it results in an advantage or disadvantage to the taxpayer...." *United States* v. *Lewis,* 340 U.S. at 592. So firmly established is this doctrine in American tax law that the disregard of its most essential element—that of timing—by the Tax Court in this case constitutes as novel and revolutionary a flight into the unknown as was the balloon ascension at Passy that so amazed Benjamin Franklin in 1783. Such a leap from judicial terra firma as the holding below, by which the Tax Court with one fateful blow shatters into confusion what both majority and minority of this Court have called the "well-established principle that each taxable year is a separate unit for tax accounting purposes" (*Arrowsmith* v. *Commissioner,* 344 U.S. 6, 8, 9-10 (1952)), must not be allowed to escape the restraining scrutiny of this Court.

For clearly, it is no mere oversight, or trivial error, that confronts the Court in this case. The Tax Court made express findings, which drive its holdings on this point into head-on collision with the principles this Court has maintained in *Sanford & Brooks Co., North American Oil* and *Lewis:*

> ". . . Those profits [determined by the Commissioner to have been distributed as dividends 'during 1947' by the corporate petitioner to the individual petitioners herein] represented the understated sales of the corporation which were received in cash and handled through the 'revolving fund.' *Jack, Carl and Morris* [the individual petitioners herein] *received that cash, periodically*

divided it equally among themselves, and at all times had complete control of it. It was not paid out for purchases or other business purposes. All unreported profits of Smiling Jack Chesbro, Inc., for the taxable year [i.e., the corporation's taxable year, beginning July 1, 1946] were thus paid to Jack, Carl and Morris as dividends. [R., 152] (Emphasis supplied).

* * * * *

". . . The corporation had income in excess of the amount reported. Its books fail to show that it retained those additional earnings or spent them for any business purpose. *The three men were the only stockholders of the corporation and had complete charge of and dominion over its funds.* They personally received the amounts from the sale of cars in excess of the prices shown on the books and through that method each retained an equal portion of the additional income of the corporation for the taxable year [i.e., the corporation's fiscal year, beginning July 1, 1946]. No dividends were actually declared but the amounts were taxable as dividends to the three stockholders. . . . [R., 156-157] (Emphasis supplied).

* * * * *

"The evidence clearly shows that the total excess received for cars [by the corporation] over the amounts shown on the books far exceeded the total excess paid for cars over the amounts shown on the books, and those excess profits *went directly into the pockets* of the individual owners of the business. They used the 'revolving fund' to assist them in pocketing the earnings . . ." [R., 158] (Emphasis supplied).

Quite obviously, since the fiscal year of the corporate petitioner herein straddled two fiscal years for each of the individual petitioners, it was incumbent on the Tax Court to make a determination, and a reasonable

determination, as to the distribution of receipt of these dividends by the respective individual taxpayers as between their two taxable years.

But the Tax Court made no such determination, nor any pretense of one, nor even a bow in the direction of an effort to do so. "Although it is fair to assume that some part [of the money] was received in [1946]," its decision states, the "entire amounts" of the constructive "dividends" received by each of the individual petitioners herein shall be taxed "as income to [them] in 1947." R., 160.

Whether this telescoping of time be regarded as mere legerdemain, or be marvelled at as purest phantasy, it upsets previously accepted tax law notions to which this Court has given its unqualified support. The Court of Appeals for the Second Circuit made no comment upon this point, although petitioners raised it before that body, and in this failure to correct the error of the Tax Court petitioners submit the Court of Appeals was mistaken. Put into its simplest terms, the question is whether two calendar years can be squeezed by the Tax Court into one, whether income received during 1946, and required by law to be returned for that year, may be required to be returned as if for 1947 merely because that is a nearby year and counting the two as one will make the computations easier.

The effects of the holding below, if allowed to stand, will obviously be both drastic and widespread, throwing the previously settled law into confusion and raising the most basic problems of tax law construction and interpretation throughout the ten Circuits. This Court should review the holding below that income,

whether received in one year or the next, can be lumped together for tax purposes and required under the law as it now stands to be returned by the taxpayer as if all received during the second year.

II

In *Cohan* v. *Commissioner,* 39 Fed. 2d 540 (C.C.A. 2, 1930), the Circuit Court of Appeals for the Second Circuit enunciated a principle "often cited, never with disapproval" (L. Hand, Circuit Judge, concurring, in *Molnar* v. *Commissioner,* 156 Fed. 2d 924, 926 (C.C.A. 2, 1946)) that the Commissioner may not refuse to allow any part of business expenses which the taxpayer has incurred, merely because the taxpayer is without documentary proof as to the exact amount of such expenditures. The basis of the Court's decision in *Cohan* was as follows:

> "In the production of his plays Cohan was obliged to be freehanded in entertaining actors, employees, and, as he naively adds, dramatic critics. He had also to travel much, at times with his attorney. These expenses amounted to substantial sums, but he kept no account and probably could not have done so. At the trial before the Board he estimated that he had spent . . . fifty-five thousand dollars in all. The Board refused to allow him any part of this, on the ground that it was impossible to tell how much he had in fact spent, in the absence of any items or details. The question is how far this refusal is justified, in view of the finding that he had spent much and that the sums were allowable expenses. Absolute certainty in such matters is usually impossible and is not necessary; the Board should make as close an approximation as it can, bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making. But to allow nothing at all

> appears to us inconsistent with saying that something was spent. True, we do not know how many trips Cohan made, nor how large his entertainments were; yet, there was obviously some basis for computation, if necessary by drawing upon the Board's personal estimates of the minimum of such expenses. The amount may be trivial and unsatisfactory, but there was basis for some allowance, and it was wrong to refuse any, even though it were the traveling expenses of a single trip. It is not fatal that the result will inevitably be speculative; many important decisions must be such. We think that the Board was in error as to this and must reconsider the evidence." [39 Fed. 2d at pp. 543-544]

Actually, the Board of Tax Appeals had made no stronger finding with regard to Cohan than the Tax Court has done with regard to the petitioners in this case.

In *Cohan,* the taxpayer's situation had been described by the Board of Tax Appeals thus:

> "The next issue is based on the claims of petitioner for deductions for advertising, entertainment and travelling expenses. We can not doubt, upon the record, that petitioner was required to and did spend large sums of money in travelling and entertainment during the period January 1, 1921, to June 30, 1923. There are, however, two obstacles to the allowance of the claims which the record has failed to overcome. One is that *the amounts claimed are bare estimates unsupported by any vouchers or bookkeeping entries of any kind.* The other is that *we do not know what part of the amounts expended were for personal expenses.* In these circumstances we can not say that the respondent erred in disallowing the deductions claimed." *Cohan* v. *C.I.R.,* 11 B.T.A. 743, 761 (1928) (Emphasis supplied).

In the present case, similarly, the Tax Court found that:

> "The Commissioner disallowed deductions claimed for travel and entertainment expenses. No records or receipts to substantiate these items are in existence. They were estimated on the tax returns . . . [R., 152]
>
> * * * * *
>
> "The Court is unwilling to accept the general statements of Jack, Carl and Morris that the understatement of purchases on the books offset the understated sales to a greater degree than is disclosed by the findings of fact . . ." [R., 155]

Yet in this case, as in *Cohan,* there was ample testimony that petitioners had in fact expended significant amounts for travel and entertainment in the course of their business activities. R., 63-66, 69, 120-122. And there was very substantial testimony that petitioners' business was infused with a pattern which involved unrecorded costs to them in even proportion with unrecorded profits; such testimony was given not only by the petitioners themselves (R., 44-47, 60, 62-63, 66-69, 113-120, 123-125, 129-131), but also by other disinterested persons (R., 14-15, 20, 22-26, 30-31, 33-35, 37-38, 42-43, 60-61, 81-85, 87-94, 106-110); the Court itself, in fact, remarked that ". . . I am inclined to be [satisfied] . . . that the used car market at that time was such that they went out and paid over ceiling prices for cars and they sold them for over ceiling prices too, except in rare instances." R., 129. Indeed, the evidence of a pattern was so substantial that the Tax Court, replying to a statement by Government counsel that he did not concede that over-ceiling prices were paid for cars although the corporation's records showed only ceiling prices, remarked:

> "Whether you have conceded that part or not, the evidence is here. The evidence that they very seldom got a car actually at the ceiling price . . ." [R., 138]

Testimony, proffered by petitioners, that precisely this sort of pattern was forced on them by its prevalence throughout the area of their operations, was rejected by the Tax Court. R., 37-38, 41-42, 72-78.

Nevertheless, the Court of Appeals affirmed the holding of the Tax Court on the application of *Cohan* to this case.

The *Cohan* rule has never, so far as petitioners are aware, been approved or disapproved by this Court. Yet its broad scope has caused it to be cited not in one alone but in a number of the Federal Circuits, e.g., *American Range Lines, Inc.* v. *Commissioner,* 200 Fed. 2d 845, 846 (C.A. 2, 1952); *Harris* v. *Commissioner,* 174 Fed. 2d 70, 73 (C.A. 4, 1949); see also *Helvering* v. *Taylor,* 293 U.S. 507, 516 (1935). This Court should review the *Cohan* rule, and pass on its application to this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

October Term, 1954

Nos. 158 to 165, incl.

Argued June 15, 1955 Decided August 9, 1955

Docket Nos. 23290 to 23297, incl.

JACK M. CHESBRO, CARL SILVERSTEIN, MORRIS SILVERSTEIN, SMILING JACK CHESBRO, INC., *Petitioners-Appellants,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent-Appellee.*

Before CLARK, MEDINA and HINCKS, *Circuit Judges.*

Appeal from an order of the Tax Court of the United States holding petitioners liable for deficiencies in income tax returns and penalties imposed thereon.

Harold Fein, Buffalo, New York, for Petitioners-Appellants.

H. Brian Holland, Assistant Attorney General, Ellis N. Slack, A. F. Prescott, S. D. Hanson, Special Assistants to the Attorney General, for Respondent-Appellee.

PER CURIAM.

We adopt the opinion of the Tax Court. 21 T.C. 123. We add only a few words addressed to the appellants' contention that the Tax Court erred in failing to apply the holding of this court announced in *Cohan* v. *Commissioner,* 39 F. 2d 540. The principal similarity of that case to this lies in the fact that in neither did the taxpayer have books

of account to support the allowance of claimed deductions. But in *Cohan,* the Tax Court was reversed only because it found that the taxpayer had made some allowable expenditures, yet gave him credit for none. That holding is not applicable here. To the extent that the Tax Court found credible evidence to support deductible expenditures, it allowed them, even in the absence of supporting books of account. The evidence offered to prove further expenditures was not such that the Tax Court was obliged to accept it, since it depended on the credibility of witnesses, largely on the credibility of the taxpayers themselves who concededly had long engaged in illegal business activities. That a witness had engaged in practices violative of federal price controls is a factor properly to be considered in judging of his credibility. Nothing in the *Cohan* case holds to the contrary. Here, the decision below was consistent with findings which on the evidence were well within the province of the trier.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 7th day of September, one thousand nine hundred and fifty-five.
Present:

HON. CHARLES E. CLARK, *Chief Judge,*
HON. HAROLD R. MEDINA,
HON. CARROLL C. HINCKS,
Circuit Judges.

JACK M. CHESBRO, CARL SILVERSTEIN, MORRIS SILVERSTEIN, SMILING JACK CHESBRO, INC., *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

A petition for a rehearing having been filed herein by counsel for the petitioners,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk

By
/s/ RALPH C. CURCIO
Deputy Clerk

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. .....

October Term, 1955

JACK M. CHESBRO, et al., *Petitioners,*

vs.

COMMISSIONER OF INTERNAL REVENUE

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioners,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

January 6, 1956

/s/ STANLEY REED
Associate Justice of the Supreme Court of the United States.

Dated this twenty-third day of November, 1955.

SUPREME COURT OF THE UNITED STATES

No. .....

October Term, 1955

JACK M. CHESBRO, CARL SILVERSTEIN, MORRIS SILVERSTEIN, SMILING JACK CHESBRO, INC., *Petitioners*

vs.

COMMISSIONER OF INTERNAL REVENUE

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioners,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including

February 4, 1956

/s/ STANLEY REED
Associate Justice of the Supreme Court of the United States.

Dated this twenty-seventh day of December, 1955